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U.S. Department of Transportation
Docket Management
Room PL-401
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Motor Vehicle Safety; Disposition of Recalled Tires
Supplemental Notice of Proposed Rulemaking
67 FR 48852, July 26, 2002

Advocates for Highway and Auto Safety (Advocates) files these comments to further clarify and explain our views regarding the disposition of recalled tires and the implementation of Section 7 of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, P.L. 106-414 (Nov. 1, 2000).

Scope of Section 7 of the TREAD Act

Advocates filed comments for this supplemental notice of proposed rulemaking, in which Advocates acknowledged that Section 7 of the TREAD Act, 49 U.S.C. § 30120(d), requiring manufacturers to include in their recall remedy program a plan to address replaced tires that are subject to the recall from being installed on another motor vehicle, as well as appropriate disposal, is limited to tires that are "reasonably within the control of the manufacturer." Comments filed by Advocates for Highway and Auto Safety, Docket No. NHTSA-2001-10856-11, at 2 (dated Aug. 16, 2002). Advocates specifically noted that the required manufacturer plans are applicable only for those tires are "within the control" of each manufacturer. *Id.*

Advocates raised two related issues that NHTSA should address in order to implement the intent of Congress. First, what is the definition of the phrase "within the control" of the manufacturer, a term that is not defined in the TREAD Act. Obviously, the scope of the manufacturer plan to address tire reuse and disposal directly depends on specific language defining what tires and what locations and entities are considered to be "within the control" of the manufacturer. Second, Advocates also raised concern about the reuse and disposal of tires that are beyond the definition of "within the control" of the manufacturer and, therefore, not included or addressed by the manufacturer plan required under Section 7.

The Rubber Manufacturers Association (RMA) contends that raising these issues will impose additional burdens on tire manufacturers that are not contemplated in the statute, and would hold tire manufacturers "responsible for actions of individuals or companies *outside of their control*." RMA comments filed with DOT Docket No. NHTSA-2001-10856-16, at 2 (emphasis added) (dated Oct. 2, 2002) (hereinafter "RMA comments"). The RMA comments also state that Advocates goes beyond the scope of Section 7 of the TREAD Act and "is asking NHTSA to re-write the TREAD Act through this rulemaking." *Id.* Neither of these claims withstand scrutiny.

With regard to the term "within the control," it is not self-evident which tires, located at many and varied different types of facilities[1], are actually "within the control" of manufacturers so that they must be covered by the Section 7 manufacturer reuse and disposal plan. Until the expression "within the control" is defined, and the application of the definition to the various legal relationships that exist in the stream of tire commerce are specifically detailed, the scope of the plans required under Section 7 cannot be adequately determined. RMA's view that tire manufacturers would be held "responsible for actions of individuals or companies *outside their control*" engages in circular reasoning, since until NHTSA delineates which individuals or companies are "*within the control*" of manufacturers for the purposes of Section 7, it is not possible to ascertain which other tires and entities are outside that control. Advocates only seeks clear definition of the statutory term "within the control" and suggests that "control" is not necessarily equivalent to ownership or actual possession.

As to RMA's concern that Advocates seeks to "re-write" Section 7, this is simply a difference in perspective. Advocates does not usurp Congressional prerogatives. Although the RMA is correct that Section 7 specifically addresses manufacturer plans

[1] The RMA comments refer to "*tire replacement facilities* 'reasonably within the control of the manufacturer.' " RMA comments at 2. Section 7 of the TREAD Act, however, only references manufacturer plans to prevent replaced tires from being resold for installation and to limit tire disposal; the statute does not specify what type of facility is subject to the plan and leaves this issue open-ended. Thus, all tires, not just those at replacement facilities, are subject to the manufacturer plan regardless of their location so long as they are "within the control" of the manufacturer.

regarding the reuse and disposal of recalled tires, the intent of the statute is obviously to ensure that all recalled tires will be taken out of circulation and disposed of in an appropriate, environmentally sound, manner. This has clear implications for recalled tires in the hands of persons who are not "within the control" of the manufacturer and, therefore, not covered by the manufacturer's Section 7 reuse and disposal plan. NHTSA has a duty not only to carry out the specific requirements of each section of the statute, but also has a public safety obligation to implement policies that will deal with safety problems in a sound and reasonable manner. It is reasonable for an expert regulatory agency such as NHTSA not only to address that portion of a problem that is specifically required by statute, but also to attempt to regulate the same problem in other factual situations. Especially in regard to public safety, it is incumbent on NHTSA to deal with the totality of the recall for defective tires even if Section 7 only addresses one aspect of the safety problem. Thus, since the agency has the inherent power to regulate the recall of defective motor vehicle equipment both under the TREAD Act and the 1966 National Highway and Motor Vehicle Safety Act, NHTSA is not legally limited by the fact that Section 7 only requires manufacturer reuse and disposal plans. Having proposed immediate destruction of tires to be part of the Section 7 manufacturer plans for tires and facilities that are "within the control" of the manufacturer, it also makes sense for the agency to require the same treatment for recalled, potentially defective tires, that are in the possession of persons or located at tire and other facilities that are not "within the control" of the manufacturer. Partial regulation of the recall requirements in this instance would present a public safety hazard and elevate a rigid formalistic reading of the statutory charge over the broader intent to improve overall tire recall safety policy.[2]

RMA's Proposed Approach

The RMA comments clarify that RMA has proposed requiring manufacturer reuse and disposal for all recalls involving more than 10,000 tires. RMA states that Advocates "misunderstands" the RMA proposal. RMA comments at 2. According to RMA, while manufacturers would prepare the required Section 7 recall plan for recalls involving over 10,000 tires[3], "if a manufacturer chooses to allow tire dealers to deal with the recalled

[2] Although Section 7 does not include a requirement that entities beyond the control of the manufacturer take any action to prevent reuse of recalled tires, that does not prohibit the agency from regulating such entities since nothing in the TREAD Act specifically precludes the agency from taking action. Regulation of this sort would impose no additional burdens on manufacturers required to file plans under Section 7.

[3] The RMA comments argue that anything not specifically stated in Section 7, such as defining the term "within the control," and regulating tires at non-manufacturer controlled locations, is not permitted. Yet, the RMA has proposed that manufacturer reuse and disposal plans should only apply to recalls involving more than 10,000 tires, despite the fact that the statute includes no such limitation. The wording of Section 7 applies to all recalled tires that are "within the control" of the manufacturer regardless of quantity. While Advocates takes no position on whether there

tires themselves [] the manufacturer [would] file an 'exception plan' regarding the recall." *Id.* Any confusion regarding the proposal derives from the fact that the difference between the basic manufacturer recall use and disposal plan and an "exception plan," is not fully explained in the RMA comments. Neither is the "exception plan" concept discussed by the RMA in its previous submissions to this docket.[4]

According to the RMA comments, "[o]nly if a manufacturer chooses to allow tire dealers to deal with the recalled tires themselves would the manufacturer file an 'exception plan' regarding the recall. * * * *Exception plans* would only be submitted to NHTSA in cases where tire manufacturers choose to have tire dealers manage the recalled tires directly." *Id.* (emphasis in original). Although RMA clearly would have a plan submitted in the case of recalls involving more than 10,000 tires, it is not at all clear how an "exception plan" differs from the manufacturer recall plan. If the "exception plan" simply devolves responsibility for ensuring that recalled tries are not resold, or disposed of appropriately, to tire dealerships and other facilities, then the plan would not fulfill the statutory requirement of Section 7.

It may be, however, that the RMA approach intends that, for each recall of more than 10,000 tires, the manufacturer must file a reuse and disposal plan to govern the recall and the "exception plan" only applies to the fact that the manufacturer intends to have the tire dealers, rather than the manufacturer, actually manage the recall. In this event, the requirement of Section 7 that the manufacturer file a recall plan would be fulfilled, regardless of the nomenclature in the plan. However, it is still an open question, to be decided by the agency, whether a manufacturer can rely on tire dealers to carry out its obligation to manage a recall under its reuse and disposal plan.

Recommendation to Destroy Tires Within a Day

The RMA comments assert that Advocates recommendation to require that recalled tires be rendered inoperable or damaged within one day of their replacement will not ensure compliance and, therefore, would not enhance public safety. While

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(note 3 continues) should be a minimum number of recalled tires involved before the Section 7 requirement is triggered, Advocates believes it is NHTSA's role as the regulatory agency to implement this provision in a reasonable manner which could include, if necessary, setting such a limit, as well as providing definition to statutory terms, and issuing regulations to govern similar practices by tire facilities that are not "within the control" of manufacturers. RMA would permit the agency discretion to act, beyond the clear wording of the statute, in areas that would reduce industry burdens, but deny the agency discretion to realize a more comprehensive tire recall and disposal program that would enhance both public safety and environmental quality.

[4] The RMA comments state that "[t]he RMA approach is discussed fully in its August 26, 2002 comments." RMA comments at 2. Yet the term "exception plan" does not appear and is not discussed in those comments.

compliance with such a requirement would not likely be universal, it is hard to understand how the RMA can maintain that compliance by authorized and other dealerships, manufacturer and independent repair and replacement facilities, and other tire shops and replacement outlets would not increase in the face of such a regulation. Advocates never contended that enforcement would be high or that it would achieve universal compliance. However, it is likely that most replacement facilities will abide by the law and certainly the number of recalled tires that are damaged upon removal from a vehicle would most certainly increase over current levels. As the number of recalled tires that are damaged to prevent reuse increases during a recall, the probability decreases that recalled and defective tires will inadvertently make their way back into the stream of commerce and be reinstalled on other vehicles. While unscrupulous parties may not voluntarily adhere to such a regulation, it is understood that this countermeasure is intended to reduce the incidence of inadvertent resale, not willful or criminal misconduct.

Environmental Aspects of TREAD Act Requirements

The RMA comments imply that Advocates has ignored the environmental aspect of Section 7 in favor of safety. This is incorrect. Advocates did urge NHTSA to strike a balance in favor of safety by requiring that recalled tires be damaged within a day. That balance, however, does not represent a choice between fulfilling either the safety or the environmental objectives of the statute. Rather, Advocates contends that public safety, in ensuring that recalled and possibly defective tires be permanently damaged to prevent resale, is more significant than the convenience and economic benefit to manufacturers who wish to resell recalled tires that are later determined not to contain a defect. The balance was between immediately rendering the tire unusable to ensure safety versus subsequent resale. This is an entirely separate and distinct issue from the environmental objectives of Section 7.

Even though the manufacturer cannot resell a damaged tire, the manufacturer can, nevertheless, dispose of the damaged tire in a manner consistent with the environmental concerns expressed by Congress. The fact that a recalled tire has been damaged to prevent resale does not determine the manner in which the manufacturer disposes of those tires. Even tires that have been damaged can be disposed of in an environmentally sound manner, and with regard for alternative beneficial uses, as required in Section 7.

Tire Manufacturers Possess the Expertise Necessary to Inspect Recalled Tires

Section 7 of the TREAD Act has, as its main goal, preventing the resale of defective tires to an unassuming public. In order to give effect to this goal, immediately rendering recalled tires unusable by damaging the tread or sidewall is the most effective method of preventing such reuse. To carry out this process, repair facility personnel need to be sufficiently trained to be able to identify tire labeling for recalled tire markings. This does not require a great deal of technical expertise or advanced equipment. NHTSA

repeatedly has noted, in granting numerous petitions seeking a determination of inconsequential noncompliance for problems arising from inaccurate tire labeling, that mechanics and trained personnel at repair and replacement facilities are adequately prepared to properly identify tire labeling problems. It should not be difficult for trained employees to determine that a particular tire, if properly marked, is included in a defect recall.

The issue of whether the tire manufacturer is better equipped to determine which recalled tires are actually defective is an entirely separate consideration. However, Advocates is not willing to venture the lives of vehicle occupants and take the risk that an unknown number of defective tires may be resold before they are collected for subsequent inspection by the manufacturer. In light of the most recent experience with defective Bridgestone/Firestone ATX, ATX II and Wilderness AT tires on Ford Explorers, and the numbers of deaths and injuries that the defect problem caused, it is better to err on the side of caution and safety, rather than to take a chance that recalled and defective tires will be resold to unsuspecting consumers.

Advocates trusts that this information will clarify the issues before the agency.

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